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Supreme Court, U.S.
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No. 04-163

IN THE

Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE SERVICE STATION DEALERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Service Station Dealers of America ("SSDA") is a national nonprofit trade association which represents the interests of independent service station dealers located throughout the United States. SSDA was formed in 1948, and represents 20 state and regional affiliates, which in turn represent over 15,000 independent dealers in over 25 states. These independent dealers have a vital interest in supporting legislation such as Act 257, Haw. Rev. Stat. § 486 H-10.4 (1997), which is intended to provide long-term benefits to the citizens of Hawaii by ensuring that the State's retail market is preserved from the oligopoly that has already seized control of the State's wholesale market for gasoline.

REASONS FOR GRANTING THE PETITION

The constitutional arguments for granting the petition have been set forth fully in the Petition for a Writ of Certiorari and will not be repeated here. Rather, SSDA will limit itself to addressing the assumptions made by the courts below that there is no reason to believe that oil companies would attempt constructive eviction by charging high rent to their lessee-dealers and that, in any event, the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806, "already prevents an oil company from raising rents for the purpose of driving dealers out of business and converting the premises to company-operated stations." *Chevron U.S.A., Inc. v. Cayetano,* 198 F. Supp.2d 1182,

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[1] In compliance with Rule 37.6 of this Court, amicus curiae, the Service Station Dealers of America, states that no counsel for any party authored this brief in whole or in part and that no party or entity other than this amicus curiae, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

1193 (D.Haw. 2002). *See also Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 856 (9th Cir. 2004).

Major oil companies like Chevron enjoy enormous leverage over lessee-dealers such as those in Hawaii because they are the dealers' landlords, licensors and exclusive suppliers. The Senate Report accompanying the passage of the PMPA expressed concern with the problem of supplier dominance that is peculiar to the petroleum industry:

> The franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in that the franchisor commonly not only grants a trademark license but also controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal sale item: motor fuel.

S.Rep. No. 731, 95th Cong., 2nd Sess., 17 (1978).

Typically, lessee-dealers will sink significant costs into their businesses based upon the reasonable assumption that their franchise and lease relationships will not be arbitrarily terminated or non-renewed. Their "reasonable expectations" in that regard were also noted in the PMPA Senate Report:

> It is also important to note that often the reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one. This expectation by the franchisee, in particular, is often the result of, and fostered by, statements and actions of the franchisor. As a result, non-

> renewal of a motor fuel franchise relationship at the expiration of its term can be almost as punitive as termination of the franchise during its term. The reasonable expectations of the franchisee, rather than any definitive contract rights, are destroyed.

Id. at 18.

Of particular significance here is the district court's recognition of the pro-competitive role that independent lessee-dealers play in maintaining interbrand and intrabrand competition in what otherwise would be an oligopolistic market, such as Hawaii. The district court entered its factual finding that "[f]ewer lessee-dealer stations in the market means that retail prices will increase." 198 F. Supp.2d at 1192. The district court explained:

> In the first place, fewer lessee-dealers means greater concentration at the retail level, which means less intra-brand and interbrand competition. In the second place, the fewer lessee-dealers there are, the easier it is for wholesale gasoline suppliers to engage in cooperative pricing, leading ultimately to higher wholesale and retail prices.

Id. The court of appeals nowhere challenged the district court's finding of fact.

If the lower courts' assumptions that oil companies will not attempt to use high rents to eliminate independent lessee-dealers and that independent dealers are in any event protected from constructive eviction by the PMPA are open to doubt, then the legislature had a reasonable basis for protecting independent dealers from constructive eviction as

a means of preventing the upward impact on retail prices that the district court found would indeed occur as the result of diminished intrabrand and interbrand competition.

SSDA believes itself qualified to comment upon the lower courts' assumptions based upon its extensive knowledge of nationwide conditions in the retail gasoline market. In fact, what has been occurring throughout the retail gasoline market over the past twenty years, coupled with the failure of the PMPA -- as interpreted by numerous courts -- effectively to address the issue of constructive eviction, directly contradicts these assumptions.

Senate Report No. 102-450 (1992) contained an early warning about the major oil companies' use of their pricing power to evict their lessee-dealers in order to convert stations to company-operation. It observed:

> Oil companies need not engage in an overt "retail below wholesale" inversion in order to drive their dealers and distributors out of business. Instead, they simply raise the dealers' costs through increased rent, credit card charges, forced 24-hour operation, and the imposition of other costs of doing business that render the superior marketing efficiency of independent dealers and distributors meaningless.

Id. at 5.

Describing the intentions of one major oil company to decimate its dealers, as detailed in its own Strategic Planning Unit document, the Senate Report recounted ARCO's plans for the future of its "dealer apparatus":

> The "dealer apparatus" would have their costs raised by the implementation of "economic rents" which would raise rents by a factor of 300 to 400 percent. This increase would have two primary effects -- it would make the company indifferent, to a degree, to the sales of motor fuel by the dealers, and it would result in hundreds of dealers being forced out and replaced by company-operated stations. ARCO then planned to "keep prices low until the political resistance fades," and after that time, a "period of lasting, accepting profitability would occur."

Id. at 6. Summarizing the unhealthy trend that it perceived, the Senate Report concluded, "Any market in which the most efficient marketers are being driven out of business is not a healthy, competitive market." *Id.* at 4.

Two recent federal decisions found that Exxon had used its pricing power methodically to drive its own lessee-dealers out of business. In *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002), the Fifth Circuit found that Exxon's Houston and Corpus Christi, Texas dealers had presented "ample evidence" to document Exxon's use of its pricing power to replace independent dealers with company-operations in Houston, and with jobber-supplied locations in Corpus Christi. The court said:

> Although Exxon decided to move to CORS [company-operated locations] in Houston and jobbers in Corpus Christi, this decision was not communicated to its franchisees. Because of profits from other sales, CORS could, and did, sell gas for less than the franchise dealers paid to Exxon for their gas.

> And the jobbers delivered Exxon gas to their dealers for less than Exxon franchisees were required to pay for their delivered gas, but Exxon prohibited its franchisees from buying at this lower price from the jobbers.
>
> Loss of competitive position and profit to plaintiff franchisees was inevitable and foreseeable to Exxon. Although Exxon witnesses denied receiving complaints, its dealers testified that they had complained often and for years, without success, until the very eve of trial.

Id.

In *Allapattah Services, Inc. v. Exxon Corp.*, 61 F. Supp.2d 1308, 1313 (S.D. Fla. 1999), *aff'd*, 333 F.3d 1248 (11th Cir. 2003), the district court denied Exxon's motion for summary judgment directed against a claim asserted by a nation-wide class of Exxon lessee-dealers that Exxon had evicted numerous of its dealers "by secretly dividing its dealers into 'keepers' and 'non-keepers,' while internally recognizing that its pricing practices were driving the 'non-keepers' out of business." Ultimately, the jury found for the dealer class after reviewing Exxon's own internal documentation, which confirmed its intent to price many of its own dealers out of business.

Such dealer victories have been rare and, significantly, were *not* achieved under the PMPA. Both *Mathis* and *Allapattah* attacked Exxon's destructive wholesale pricing of gasoline under Uniform Commercial Code § 2-305, which subjects the sale of goods pursuant to open-price-term contracts (such as dealer supply agreements) to a standard of commercial reasonableness. That provision

is not applicable, however, to excessive rent demands made by oil companies on a non-negotiable basis at the time of lease renewal, with the intent and/or effect of making it impossible for the lessee-dealer to continue to operate his or her station.[2]

The PMPA has *not* been effective in protecting independent dealers targeted for extinction through non-negotiable high rent demands at the time of lease renewal. This is because the pertinent statutory provision, 15 U.S.C. § 2802(b)(3)(A), only grants relief to a dealer who can prove that his or her supplier acted with subjective bad faith or with the express purpose of converting his or her station to company operation. As a result, so long as the oil company is not stupid enough to concede the true purpose of its high rent demands, the dealer is very unlikely to secure relief under the PMPA. *See, e.g., Duff v. Marathon Petroleum Co.*, 863 F. Supp. 622, 628 (N.D. Ill. 1994), *aff'd*, 51 F.3d 741 (7th Cir. 1995) ("Under the PMPA, Marathon does not need to prove that the rent increases were reasonable, only that they were made in the ordinary course of business and not as a pretext for termination of the franchise."); *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 368 (D. Conn.), *aff'd*, 889 F.2d 1280 (2d Cir. 1989) (rent increases of up to 761% not challengeable because it is not sufficient that rent formula "operate unreasonably in a particular case"); *Brown v. Magness Co.*, 617 F. Supp. 571, 575 (S.D. Tex. 1985) ("The fact that new provisions in a franchise agreement may make the station unprofitable for the lessee is not of itself

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[2] Some recent decisions have cut back on the enforcement of UCC § 2-305 by rejecting the relevance of evidence of an oil company's subjective intent to drive its dealers out of business through unreasonably high wholesale pricing. *See Tom-Lin Enters., Inc. v. Sunoco, Inc.*, 349 F.3d 277 (6th Cir. 2003); *Shell Oil Co. v. HRN, Inc.*, ___ S.W.2d ____ (Tex. Aug. 27, 2004). The impact of these decisions is to further weaken the ability of independent dealers to resist the oil companies' use of high wholesale pricing to force them from their businesses.

determinative of an improper purpose, nor does the fact that the new terms are presented on a take-it-or-leave-it basis constitute lack of good faith.") (internal citations omitted); *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 330 (D. N.J. 1982) (upholding rental increase of over 300%).

Loading the dice further against dealers seeking to challenge exorbitant rent demands presented to them on a non-negotiable basis by their oil company landlords, two circuits have recently held that dealers cannot sign leases "under protest" and commence PMPA litigation, but must risk non-rescindable notice of termination in order to mount a court challenge. *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003); *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002). This means that if the dealer is unable to unmask the oil company's true subjective intent, he or she is out of business.

Further undermining the willingness or ability of independent dealers to mount a PMPA challenge is the virtually universal practice of oil companies of inserting in their form franchise agreements prevailing party attorneys-fees provisions or one-sided provisions requiring the dealer to pay the oil company's attorneys fees if his or her challenge is unsuccessful. To the dealer alone such attorneys fees are ruinous.

The net result of all this is that, in the real world, attempts by independent dealers to use the PMPA to challenge their suppliers' unreasonable take-it-or-leave-it rent proposals are rarely even attempted much less successful, which is totally inconsistent with the lower court's erroneous assumption that the PMPA "prevents an oil company from raising rent for the purpose of driving dealers out of business and converting the premises to company-

operated stations." *Chevon U.S.A.,* 198 F. Supp.2d at 1193. That, in the real world, simply is not so.

Unfortunately, SSDA lacks the ability and resources to document the exact extent through which the ranks of independent dealers have been thinned by the oil companies' exorbitant non-negotiable rent demands. From observation of the industry, however, SSDA submits that the impact has been very substantial. Typical of the extensive anecdotal evidence that it has received is the report last month from its New England affiliate:

> Shell has raised rents so much in Massachusetts and New Hampshire that the dealer population has been reduced by about 40% in the past three years. There is only one dealer left on Cape Cod, a few years ago there were dozens. Dealers exhausted their working capital, then resorted to loans and equity loans. Most eventually lost their businesses, some had buyers, but still went bankrupt because of the lengthy, cumbersome, subjective approval process [required by Shell to obtain its consent to assignment].
>
> Exxon is similar, may dealers got fed up and turned in the keys. All along intending to sell the business as a substantial part of their retirement savings.

In upholding the constitutionality of a Maryland divorcement statute intended to preclude oil companies from displacing independent dealers with company-operated stations, this Court stated:

> The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation' ...." *Ferguson v. Skrupa*, 372 U.S. 726, 731 (citation omitted) ... Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1978).

SSDA respectfully submits that due deference should similarly be shown to Hawaii's analogous determination that independent dealers should be preserved from extinction in order to promote interbrand and intrabrand competition in the retail gasoline market. This is particularly so because the lower courts' assumptions that oil companies will not use high rents to eliminate lessee-dealers and that those dealers are adequately protected by the PMPA are debatable at best; and, the district court itself recognized the substantial linkage between preserving interbrand and intrabrand competition at the retail level and protecting Hawaii's citizens against the threat of oligopolistic price gouging. *Chevron U.S.A.*, 198 F. Supp.2d at 1193. SSDA respectfully submits, therefore, that the lower courts' invasion of Hawaii's legislative province should be reviewed by this Court.

Respectfully submitted,

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